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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

A&S METAL RECYCLING, INC.,	B294623
Plaintiff and Respondent,	(Los Angeles County
v.	Super. Ct. No. BC705609)
WILSON'S METAL EXCHANGE ,	
INC., et al.,	
Defendants and Appellants.	

APPEAL from an order of the Superior Court of Los Angeles County, William F. Fahey, Judge. Affirmed.

Horvitz & Levy, John A. Taylor, Felix Shafir and Aaron Henson; Smith & Benowitz and Benjamin J. Smith for Plaintiff and Respondent.

Scheper Kim & Harris, Gregory A. Ellis, Angela M. Machala and Aaron O'Dell; Law Office of Bruce Adelstein and Bruce Adelstein for Defendants and Appellants.

INTRODUCTION

Wilson's Metal Exchange, Inc. (Wilson's Metal), Aaron Roth, and Ed Fernandes (collectively defendants) appeal the trial court's order denying their special motion to strike, pursuant to Code of Civil Procedure section 425.16,¹ a complaint filed against them by plaintiff A&S Metal Recycling, Inc. We conclude the trial court properly denied defendants' motion to strike and, therefore, affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Summary of Facts That Led to Plaintiff's Lawsuit Against Defendants*

Wilson's Metal and A&S are competitors in the metal recycling business. Roth and Fernandes are the president and vice president, respectively, of Wilson's Metal. Defendants claim that in 2016, Sergio Rey, a former employee of both Wilson's Metal and A&S at the time, gave Roth photographs and videos he purportedly took at A&S's facilities that depicted A&S improperly disposing of hazardous materials. Roth and Fernandes believed the photographs and videos were genuine. Rey also provided Roth with a copy of an e-mail from Cory Scott, A&S's Vice President of Sales and Marketing, entitled "Waste in yard," and it purported to reveal Scott instructing A&S's employees to move or hide waste before a customer's upcoming inspection.

¹ The lawsuit is commonly referred to as a strategic lawsuit against public participation (SLAPP) and the motion as an anti-SLAPP motion. All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

Rey, with Roth's assistance, took the photographs and videos to the Los Angeles County District Attorney's Office. Roth and Fernandes claimed to be concerned about A&S's alleged conduct because A&S's facilities were close to the Los Angeles River. After not hearing from the District Attorney's office by late 2017, Roth and Fernandes concluded they had to take the matter to the public. They then created PowerPoint presentations using unaltered versions of the photographs and videos Rey gave them and Scott's e-mail. Roth augmented this material with public records he found about A&S's supposed past environmental misconduct. The PowerPoint presentations were posted on a publicly available website at the address <http://stopasmetalrecycling.org>. Defendants placed logos of the District Attorney's Office and the Environmental Protection Agency (EPA) on the last page of one of the PowerPoint presentations.

Fernandes also forwarded to a reporter and to six other individuals in the recycling business an e-mail from a customer, which had forwarded to him a summary of the website prepared by a third-party due diligence investigator. The e-mail included additional editorial content from the customer.

When A&S first learned about the website, it sent cease-and-desist letters to the website hosts demanding that the site be shut down. The website was taken down. However, a second version appeared at the same link a few weeks later. This one included official logos of the District Attorney's Office and the EPA. It had a revised format that allowed visitors to download the PowerPoint presentations and a folder that contained records and litigation filings from commercial disputes involving A&S. Above the logos was the statement "It is recommended that

customers of A&S Metal Recycling cease doing business with them immediately to avoid possible implication in these illegal activities.” A&S sent another cease-and-desist notice to the website hosts and one to Rey, believing by that time that Rey was involved in the dissemination of the material. Defendants denied any involvement in the creation and dissemination of the website.

B. *A&S Files an Action Against Defendants*

On May 9, 2018, A&S filed an initial complaint against DOE defendants, asserting causes of action for libel per se, trade libel, intentional and negligent interference with prospective economic advantage, and violation of Business & Professions Code section 17200. On August 22, 2018, A&S filed a first amended complaint specifically against defendants, Rey, and others A&S alleged created and published the website.

In the first amended complaint, A&S added causes of action for conspiracy and impersonation of another on a website to harm, intimidate, threaten or defraud (Pen. Code, § 528.5). It identified false, defamatory, and misleading information on the website <http://stopasmetalrecycling.org>. These included statements such as customers being “at risk of being included in the list of companies required to pay for the remediation of contaminated property”; “[i]t is recommended that customers of A&S Metal Recycling cease doing business with them immediately to avoid possible implication in these illegal activities”; and captions on pictures and text on the website that were entitled “A&S Metal Recycling is in the practice of illegally disposing of hazardous waste”, “Chemicals are spilled onto the ground that end up in the LA River”, and “A&S has been convicted of defrauding the Southern California Rapid Transit District for false hazardous waste disposal charges”.

A&S claimed the photographs and videos Rey gave defendants were staged. It also stated it fired Rey because he had solicited kickbacks from one of its customers on behalf of Wilson's Metal. A&S further alleged the defamatory statements were directed to its actual and potential customers with the intent of deterring those customers from doing business with it, and defendants knew the statements were false or they did not take reasonable care to determine the statements' truth or falsity.

C. *Defendants File the Anti-SLAPP Motions*

On September 7, 2018, Wilson's Metal and Roth filed an anti-SLAPP motion seeking to strike the complaint in its entirety, and Fernandes filed a separate anti-SLAPP motion in which he incorporated arguments Wilson's Metal and Roth made in their motion and included additional arguments targeting the trade libel and conspiracy claims.² Defendants supported their motions with declarations from Roth, Fernandes, Rey, and Gregory Ellis, counsel for defendants. Essentially, they claimed all of A&S's causes of action arose from speech on the website that concerned matters of public interest—the improper disposal of hazardous materials and the health of the Los Angeles River. Defendants added A&S could not show a probability of success on the merits of its libel claims because California law required the pleading of libelous statements with specificity, and the website statements A&S identified were non-actionable opinion; A&S could not show probability of success on the malice element of the libel claims because defendants did not act with knowledge of

² Rey and the other defendants did not file anti-SLAPP motions. They are not parties to this appeal.

falsity or reckless disregard of the truth; and, because defendants lacked the requisite mental state regarding the Penal Code section 528.5 claim, A&S could not show the probability of success needed for that claim.

A&S sought to conduct discovery concerning defendants' state of mind when they created, published, and disseminated the website. But the court denied the requested discovery, finding that A&S did not make a good cause showing that witnesses possessed the evidence A&S needed to establish the probability it would prevail on its claims.

A&S then opposed the anti-SLAPP motion, arguing the defamatory statements came under the "commercial speech" exception to the anti-SLAPP statute, did not involve any issue of public interest and, therefore, did not constitute protected speech. In support of its opposition, A&S submitted declarations from several individuals, including Scott.³ In his declaration, Scott explained the process by which A&S processed scrap metal for recycling and stated A&S had never illegally dumped hazardous waste and had never been found to have done so by the EPA, District Attorney's Office, or any other agency. He noted the clients and business opportunities A&S lost as a result of defendants' creation of the website. Scott also explained how Rey likely staged the photographs that were posted on the website

³ The other declarants were Miguel Cabrera, shipping and materials manager for Arconic, Inc., one of A&S's clients to whom Fernandes forwarded the link to the website; Courtney Bowman, a contractor for A&S; Robert Galbraith, safety manager for California Drop Forge, Inc., one of A&S's clients who declared Rey offered him kickbacks; Mary Elizabeth Reed, A&S's Vice President of U.S. Operations; and George Nebria, A&S's yard manager.

and detailed why the other photographs were false and misleading. He added the e-mail statement posted on the website attributed to him was taken out of context, as he was only instructing Rey and other A&S personnel to make sure the facility's yard was especially clean prior to an audit by a potential customer.

In the other declarations A&S submitted, it presented evidence that defendants intended to disrupt A&S's relationships with its customers and proactively sought to take those customers away from A&S, and existing customers refrained from engaging in further business with A&S. The other declarants also expressly denied defendants' allegations that A&S had engaged in criminal activity.

D. *The Court's Ruling on the Anti-SLAPP Motions*

The trial court denied the anti-SLAPP motions on December 12, 2018. It concluded because the websites were public fora and the challenged statements involved trash and waste recycling and disposal issues, these were matters of public interest. It also did not find that section 425.17's commercial speech exception applied.⁴ The court reasoned that although

⁴ Section 425.17, subdivision (c), exempts certain commercial speech from anti-SLAPP protection. That provision reads, in pertinent part, "Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, . . . arising from any statement or conduct by that person if both of the following conditions exist: ¶ (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing

defendants had satisfied their burden concerning the first prong of the anti-SLAPP analysis, A&S, in turn, had satisfied its burden with respect to the second prong by showing there was a probability of it succeeding on its claims. The court added the evidence was sufficient for a trier of fact to conclude the challenged statements were demonstrably and provably false and for malice to be found based on Rey being biased as a disgruntled former employee, defendants' financial motivation to harm A&S's business, and there being no evidence of defendants conducting a proper investigation before relying on the information Rey provided. The court also expressed particular concern about defendants' use of the District Attorney's Office's and the EPA's logos.

A&S served a notice of ruling on the motion on December 13, 2018, and defendants filed their appeal on December 19, 2018.

DISCUSSION

Defendants contend, because the subject speech on the website was on a public forum and addressed topics of public interest, and because A&S did not properly plead or present a *prima facie* case to support its claims, the trial court erred in denying their anti-SLAPP motions.

sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services. ¶ (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer." (§ 425.17, subd. (c).)

A. Applicable Law and Standard of Review

The anti-SLAPP statute provides “[a] cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (§ 425.16, subd. (b)(1).) Section 425.16, subdivision (e), states, as relevant to this appeal, “[a]s used in this section, ‘act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue’ includes . . . (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.”

An order granting or denying an anti-SLAPP motion is reviewed de novo. (*Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 788; *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067 (*Park*).) “We exercise independent judgment in determining whether, based on our own review of the record, the challenged claims arise from protected activity. [Citations.]” (*Park*, at p. 1067.) The analysis of an anti-SLAPP motion involves a two-step process. First, we must determine whether a defendant has made a threshold showing that “the challenged allegations or claims ‘aris[e] from’ protected activity in which the defendant has engaged. [Citations.]” (*Id.* at

p. 1061.) Therefore, a defendant must show the challenged activities “fall within one or more of the four categories of “act[s]” protected by the anti-SLAPP statute.” (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 884 (*Wilson*).) Second, “[i]f the defendant carries its burden, the plaintiff must then demonstrate its claims have at least ‘minimal merit.’ [Citations.]” (*Park, supra*, 2 Cal.5th at p. 1061.)

On review of an order granting or denying an anti-SLAPP motion, we neither weigh the parties’ credibility nor compare the weight of the evidence; rather, we accept as true the evidence favorable to the plaintiff and evaluate the defendants’ evidence only to determine if it has defeated the evidence presented by the plaintiff as a matter of law. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 385; *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.)

B. Defendants’ Activities Are Not Protected by the Anti-SLAPP Statute

Defendants stake out the position that they disseminated information in a public forum for the expressed purpose of warning the public about alleged criminal conduct in which plaintiff was involved. They, therefore, contend A&S’s claims against them arise from protected activities because the statements on the website come within section 425.16, subdivisions (e)(3) and (e)(4). Section 425.16, subdivision (e)(3) protects any written statement “made in a place open to the public or a public forum in connection with an issue of public interest,” while section 425.16, subdivision (e)(4) protects “any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” To

satisfy their burden under the first prong of the anti-SLAPP statute, defendants must then establish the statements that A&S claims are defamatory were made in connection with a public issue or an issue of public interest. (*Wilson, supra*, 7 Cal.5th at p. 884.)

In *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133 (*FilmOn.com*), the Supreme Court held “[t]he inquiry under [section 425.16, subdivision (e)(4)] calls for a two-part analysis rooted in the statute’s purpose and internal logic. First, we ask what ‘public issue or [] issue of public interest’ the speech in question implicates—a question we answer by looking to the content of the speech.” (*FilmOn.com*, at p. 149.) For anti-SLAPP purposes, “[i]n articulating what constitutes a matter of public interest, courts look to certain specific considerations, such as whether the subject of the speech or activity ‘was a person or entity in the public eye’ or ‘could affect large numbers of people beyond the direct participants’ [citation]; and whether the activity ‘occur[red] in the context of an ongoing controversy, dispute or discussion’ [citation], or ‘affect[ed] a community in a manner similar to that of a governmental entity.’” (*Id.* at pp. 145-146.)

Second, we consider whether a “functional relationship exists between the speech and the public conversation about some matter of public interest.” (*FilmOn.com, supra*, 7 Cal.5th at pp. 149-150.) “[I]t is not enough that the statement refer[s] to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate.” (*Id.* at p. 150.) “[T]he inquiry of whether a statement contributes to the public debate is one a court can hardly undertake without incorporating

considerations of context—including audience, speaker, and purpose.” (*Id.* at pp 151-152.)

Defendants contend the issues of public interest are the disposal of hazardous chemicals and the effect A&S’s acts had on the Los Angeles River. The challenged statements involve accusations that A&S committed, was being investigated for, and was convicted of environmental crimes. As such, they relate specifically to A&S’s business practices.

In determining whether an anti-SLAPP motion is well taken, *FilmOn.com* instructs us that “the focus of our inquiry must be on ‘the specific nature of the speech,’ rather than on any ‘generalities that might be abstracted from it.” [Citation.] Defendants cannot merely offer a ‘synecdoche theory’ of public interest, defining their narrow dispute by its slight reference to the broader public issue.” (*FilmOn.com, supra*, 7 Cal.5th at p. 152.)⁵

⁵ The Supreme Court granted review in *Geiser v. Kuhns* (Feb. 28, 2020, B279838) [nonpub.opn.], review granted July 22, 2020, S262032. In that case, the Court of Appeal affirmed the trial court orders concerning the defendants’ anti-SLAPP motion against the plaintiff’s civil harassment petitions. The Supreme Court had earlier transferred the case back to the appellate court with directions for it to reconsider its affirmance in light of the *FilmOn.com* decision. After considering *FilmOn.com*’s application to the case, the Court of Appeal again affirmed the trial court’s orders. The Supreme Court on review will decide how it should be determined what public issue or issue of public interest is implicated by speech within the meaning of section 425.16, subdivision (e)(4), and the first step of the two-part test articulated in *FilmOn.com*, and should deference be granted to a defendant’s framing of the public interest issue at this step.

In the instant case, while information generally related to the Los Angeles River would concern an issue of public interest, defendants' statements concerning A&S's business practices do not. (See *Bernstein v. LaBeouf* (2019) 43 Cal.App.5th 15, 24 ["While racism is undoubtedly an issue of public interest, a defendant cannot convert speech that would otherwise not be [subject to the anti-SLAPP statute] into protected activity by 'defining the [] narrow dispute by its slight reference to the broader public issue'"]; *Dual Diagnosis Treatment Center, Inc. v. Buschel* (2016) 6 Cal.App.5th 1098, 1105-1106 [court held while discussion of drug and alcohol rehabilitation services may well be an issue of public interest, licensing status of a single rehabilitation facility was not]; *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90 (*Mann*), disapproved on another ground in *Baral v. Schnitt, supra*, 1 Cal.5th at p. 392, [in holding the anti-SLAPP statute did not apply, court reasoned challenged statements "were not about pollution or potential public health and safety issues in general, but about [the plaintiff's] specific business practices"]; *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 34 [speech at issue concerned a company's investment investigation services and was not about investment scams in general].)

Defendants argue *Industrial Waste & Debris Box Service, Inc. v. Murphy* (2016) 4 Cal.App.5th 1135 (*Industrial Waste*) applies. But that case is distinguishable. In *Industrial Waste*, the plaintiff was a company that hauled waste under franchise agreements it had with several cities in Sonoma County; the defendants were a waste management consultant and his company, who had prepared a report for one of the plaintiff's

competitors. (*Id.* at pp. 1140-1141.) The report questioned the accuracy of statements the plaintiff made in public reports about the percentages of waste materials it collected that were recycled and diverted to landfills. (*Id.* at p. 1141.) The plaintiff filed a complaint alleging that the defendants' report was false and defamatory and caused the plaintiff to suffer losses. (*Ibid.*) The defendants filed an anti-SLAPP motion. (*Ibid.*) The court found the consultant's report satisfied the public interest component of the statute because it "was not solely focused on plaintiff or its services." (*Id.* at p. 1149.) Rather, the consultant had obtained information from public records and then commented on whether waste hauling companies generally in the county were meeting governmental standards. (*Ibid.*)

In the instant case, the challenged statements relate to A&S's specific business practices, not to the practices of any other company. By connecting A&S's operations to the Los Angeles River, defendants only "offer a 'synecdoche theory' of public interest." (*FilmOn.com, supra*, 7 Cal.5th at p. 152.) The statements are not focused on whether other metal recycling companies generally in the area were complying with governmental requirements or otherwise committing environmental crimes. Further, the statements were made in a commercial context in that A&S and Wilson's Metal were direct competitors, and the contextual evidence reveals defendants directed the statements specifically to A&S's current and former customers and to law enforcement. Defendants also admit that no media coverage resulted from their activities, and they do not contend that any criminal investigation took place.

With respect to defendant's claim that the "public concern" about A&S's alleged business operations relates to the operations'

impact on the Los Angeles River because A&S's facilities are located near the river, defendants provided no evidence of that being the case. However, even if the facilities were in close proximity to the river, defendants offered no evidence that any of A&S's purported activities specifically impacted the river.

Additionally, defendants did not establish that the challenged statements, in context, contributed to the public debate on the issue of illegal dumping of hazardous wastes. Defendants do not identify any relevant public debate or discussion to which the challenged statements meaningfully contributed. (See *Wilson, supra*, 7 Cal.5th at p. 900; *FilmOn.com, supra*, 7 Cal.5th at pp.150-152.) Simply placing the statements on a website accessible to the public, does not, by itself, contribute to a public debate. "A private dispute does not become a matter of public interest simply because it was widely communicated to the public." (*Bernstein v. LaBeouf, supra*, 43 Cal.App.5th at p. 24.) The website statements also directed readers to not use A&S's services; it did not direct them to assist in any effort to resolve the pollution of the Los Angeles River, for example, by contacting regulators or local agencies responsible for doing so.

Therefore, because the challenged statements are too tenuously tethered to the issue of possible pollution of the Los Angeles River and illegal dumping of hazardous waste generally and too remotely connected to any public conversation about such issues, we conclude defendants did not satisfy their burden of showing those statements were protected speech activity connected with a public issue meriting protection under section 425.16 subdivisions (e)(3) and (e)(4). (*FilmOn.com, supra*, 7 Cal.5th at p. 140.)

Because we determine defendants have not met their burden to show A&S's complaint is subject to the anti-SLAPP statute, we need not consider the second prong of the anti-SLAPP analysis—whether A&S has demonstrated it is likely to succeed on the merits of its claims. (*C.W. Howe Partners Inc. v. Mooradian* (2019) 43 Cal.App.5th 688, 698.)

DISPOSITION

The court's order denying defendants' section 425.16 motion to strike is affirmed. A&S is to recover its costs on appeal.

RICHARDSON, J.*

We concur:

SEGAL, Acting P. J.

FEUER, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.